IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5861 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

USMANKHAN H PATHAN

Versus

STATE OF GUJARAT

Appearance:

MR AJ PATEL for Petitioner

MS. NANDINI JOSHI AGP for Respondent No. 1 - State

Respondent No.2 - served.

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 10/11/2000

ORAL JUDGEMENT

1. In this petition filed under Article 227 of the Constitution of India the petitioner has challenged (i) order dated December 22, 1978 passed by Assistant Collector, Dholka and (ii) order dated May 28, 1990 passed by Deputy Secretary, Revenue Department (Appeals), Gujarat State which are annexed as Annexures 'D' and 'E'

respectively. By the order passed by the Assistant Collector, Dholka, sale deed dated February 24, 1971 was cancelled and the petitioner was directed to obtain prior permission and then to execute the sale deed while by the order passed by the Deputy Secretary, Revenue Department (Appeals), the revision application filed by the petitioner was rejected and the petitioner was directed to be evicted from the land in question and confiscate the land to the Government in exercise of powers conferred under sub-clause (3) of Section 9 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (hereinafter referred to as 'the Act').

2. In order to appreciate the grievance of the petitioner a few relevant facts may be stated at the outset.

3. The land bearing S.No. 783/2 admeasuring 20 gunthas situated in the sim of Dholka, District Ahmedabad, originally belonged to respondent No.2. Out of the said land, a portion admeasuring 10 gunthas was cultivated by a tenant of respondent No.2 before even the Act came into being. In view of the provisions of the Bombay Tenancy Act, the tenant who was cultivating land was entitled to purchase 10 gunthas out of the said Survey Number and accordingly by an order dated November 22, 1966, the tenant of respondent No.2 was declared to be the deemed purchaser of the said portion of land in exercise of powers conferred under Section 32 (g) of the Bombay Tenancy Act. The said transaction had become final and mutation entry to that effect was made in the pahnipatrak record. As a result of the aforesaid order, respondent No.2 became owner of remaining 10 gunthas of land out of Survey No. 783/2. The petitioner purchased the said 10 gunthas of land from respondent No.2 by a registered sale deed dated February 24, 1971. According to the petitioner, he purchased the said land because he owned and possessed lands bearing Survey Nos. 783/1 and 785 which are situated just adjoining the land in question. After purchasing the said parcel of land, the petitioner settled down to cultivation and improvement of the said land and he has considerably improved the said land and invested a lot of money in improving the land in question.

4. The Assistant Collector, Dholka initiated proceedings under the provisions of the Act way back in the year 1978 on the ground that the petitioner has created a fragment as a result of the purchase of the land in question and thereby committed breach of the provisions of Section 8 of the Act. The petitioner was served with a notice

under the Act to which he replied by raising several contentions. But the Assistant Collector, Dholka by order dated December 22, 1978 held that there was a technical breach of the provisions of the Act. However, he exercised discretion in favour of the petitioner and the petitioner was directed to get sale deed executed in his favour after obtaining prior permission from the competent authority. Aggrieved thereby the petitioner preferred revision application before the Additional Chief Secretary, Revenue Department (Appeals), Ahmedabad. The Deputy Secretary, Revenue Department (Appeals) vide order dated May 28, 1990 rejected the said revision application and ordered confiscation of the land in question to the Government. Aggrieved by the aforesaid two orders, the petitioner has filed the present petition.

5. Mr. A.J. Patel, learned advocate for the petitioner, strenuously contended that in fact there is no breach of any of the provisions of the Act since the petitioner has purchased the remaining 10 gunthas of land which was a fragment as the remaining 10 gunthas of land were already transferred to the tenant by virtue of the operation of the Bombay Tenancy Act way back in the year 1966. It was stressed that since the petitioner's land is adjacent to the land which is purchased by him, the bar under Section 7 (1) of the Act could not have applied on the ground that land of the petitioner is contiguous to the fragment. Learned advocate for the petitioner emphasized that even for the sake of arguments it is held that there was a technical breach of the provisions of the Act the same had taken place in the year 1971 and thereafter the petitioner has settled down in possession and improved the land in question by investing considerable amount and, therefore, after a period of 7 years, no proceeding under the Act should have been initiated by the Assistant Collector under the provisions of the Act and hence the said proceeding was arbitrary and violative of Article 14 of the Constitution. On the aforesaid premises Mr. Patel contended that both the orders are arbitrary, unjust, unreasonable and, therefore, both the orders are liable to be set aside and quashed by allowing the petition.

6. Respondent - State of Gujarat appeared through learned AGP. However, no affidavit in reply controverting the averments made in the petition is filed. However, the petition is contested by making oral submissions.

7. I have heard Mr. A.J. Patel, learned advocate

for the petitioner and Ms. Nandini Joshi, learned AGP for respondent State Government. Though served, respondent No.2 elected to remain absent.

8. So far as the factual aspect of the matter is concerned, there is no dispute at all. There is no dispute that the land bearing S.No. 783/2 initially was admeasuring 20 gunthas. There is also no dispute that tenant of respondent No.2 was declared deemed purchaser in respect of 10 gunthas of land out of S. No. 783/2 under section 32 (g) of the Bombay Tenancy Act by order dated November 22, 1966. Therefore, those 10 gunthas were transferred to the name of the tenant of respondent No.2 and mutation entry to that effect was made in the pahnipatrak. Therefore, the said S.No. 783/2 was admeasuring 10 gunthas only and the said transfer under Section 32 (g) had taken place long back in the year 1966 as the tenant was cultivating the said land prior to the Act coming into force and, therefore, obviously when the petitioner purchased the said land it was only 10 gunthas which was a fragment even in the hands of the original owner. There is also no dispute that the petitioner is the owner and in possession of S.Nos. 783/1 and 785 which are contiguous to the land in question and, therefore, the said purchase has on the contrary prevented fragmentation since the said 10 gunthas of land is adjoining to S. Nos. 783/1 and 785 owned by the petitioner. Therefore, it can be said that the said transaction is not detrimental to the Act but on the contrary it fulfills the object of the Act.

9. The contention that since the land bearing S.Nos. 783/1 and 785 which are owned by the petitioner are situated adjoining the land in question, that is, the land admeasuring 10 gunthas purchased by the petitioner is a contiguous Survey Number, the bar under Section 7 (1) of the Act does not apply to the said case, has much substance. At this stage it would be instructive to refer to Section 7 of the Act, which reads thus:

"Sec. 7. Transfer and lease of fragments

(1) No person shall transfer any fragment in respect of which a notice has been given under sub-sec. (2) of sec. 6 except to the owner of a contiguous survey number or recognised sub-division of a survey number:

Provided that the holder of such fragment may mortgage or transfer it to the State Government or land mortgage bank or any other co-operative society as security for any loan advanced to him by the State Government or such

bank or society, as the case may be.

(2) Notwithstanding anything contained in any law for the time being in force or in any instrument, or agreement, no such fragment shall be leased to any person other than a person cultivating any land which is contiguous to the fragment."

On a plain reading of sub-section (2) of Section 7 of the Act, there is no manner of doubt that no such fragment shall be leased to any person other than a person cultivating any land which is contiguous to the fragment. Admittedly, the petitioner's land is situated just adjacent to the said land or it is contiguous to the fragment. Therefore, the bar contained in section 7 (1) of the Act does not apply to such cases.

10. In this connection it would be appropriate to refer to the judgment rendered by this Court in the case of Vithalbhai Bhailalbhai Patel v. T.V. Krishnamurthy and another, reported in 1984 (1) GLR 151. In the said case this Court has held that in respect of contiguous survey numbers of two adjoining holdings, prohibition against transfer under Section 7 (1) of the Act does not apply and only because the fragmentation lies in adjoining village the right of owner of contiguous survey number to purchase adjoining survey number is not barred. In paragraph 5 of the said judgment, this Court has made the following observations:

"5. Mr. Shevade, learned advocate for the petitioner, submitted before me that on the record of the case, it is clearly established that the disputed survey number which the petitioner purchased under the impugned transaction being S. No. 49 was just touching the petitioner's S. No. 494/1 admeasuring 2 acres 19 gunthas, though situated in the revenue limits of village Bhilapur. Mr. Shevade contended that for the purpose of sec.7 of the Act, whether contiguous survey number is situated in the same village or in different village is an irrelevant consideration. Mr. Shevade further contended that so far as consolidation scheme is concerned, it came to be initiated three years after the transaction i.e., in the year 1971 and initiation of such consideration scheme three years after the sale transaction cannot have any vitiating effect on the sale transaction retrospectively. He further contended that in

any case, the impugned orders are not passed by the authorities acting under the Act as per the provisions of sec. 31 of the Act. On the facts of the case, no notice under sec. 31 is given to the petitioner and it could not be given for the simple reason that at the time of the impugned transaction, consolidation scheme proceedings were not initiated in the area. Hence there was no question of consolidation proceedings being completed and final blocks being formed and allotted. He, therefore, contended that the impugned orders are patently bad in law and liable to be set aside."

11. Applying the aforesaid principles to the facts of the present case, at the cost of repetition, be it stated that fragmented land purchased by the petitioner is adjacent to his own land and hence bar contained in Section 7 (1) of the Act is lifted as the transaction came to be entered into between the two owners of two contiguous survey numbers.

12. The petitioner purchased the said land as back as in the year 1971 whereas the proceeding by Assistant Collector, Dholka was initiated in the year 1978, that is, after lapse of 7 years. On having perusal of the order passed by the Assistant Collector, it is seen that he has cancelled the said sale. However, he has not ordered the eviction of the petitioner from the land but directed the petitioner to get a fresh sale deed after obtaining prior permission from the competent authority. In fact, there is a bar to purchase fragmented land under Section 7 (1) of the Act. On further perusal of the said order of the Assistant Collector it is seen that the petitioner was allowed to continue even with the illegal possession. The petitioner, therefore, thought it fit to file revision application before the Additional Chief Secretary, Revenue Department (Appeals).

13. The contention that the proceeding initiated by the Assistant Collector, Dholka in the year 1978, that is, after lapse of 7 years, is grossly belated and hence is unreasonable, unjust and illegal and on the basis of that proceeding no order of eviction could have been recorded, has also much substance. In the case of Ranchhodbhai Lallubhai Patel v. State of Gujarat and others, 1984 (2) GLR 1225 this Court has held that exercise of powers under section 9 at a belated stage is unreasonable, unjust and illegal and, therefore, such an inaction on the part of the authorities exercising powers under the Act for number of years and waking up after 7

years by issuing notice to the concerned parties for showing cause why the transaction entered into by them should not be declared as null and void, has got to be held, on the facts of this case, to be quite unreasonable. In the said decision, judgment dated 29.9.1983 rendered by the Supreme Court in Mansaram v. S.P. Pathak and others (Coram: D.A. Desai and R.B. Misra, JJ.) in Civil Appeal No. 1262 of 1978, was referred to wherein speaking for the Supreme Court, D.A. Desai, J. has observed that "where the power is conferred to effectuate a purpose, it has to be exercised in a reasonable manner and the reasonable exercise of power inhers its exercise within a reasonable time. This is too well established to need buttressing by a precedent."

14. The ratio laid down in Ranchhodbhai's case (supra) has been followed by this Court in the case of Rathod Nayamatkhan Ahmedkhan (decd) v. M.K. Dass, Dy. Collector, Dabhoi, 1998 (2) GLH 459 (= 1998 (3) GLR 2547). In the said case this Court has held that if authority exercises powers under Section 9 of the Act after long lapse of time it must consider whether the purchaser has altered his portion by constructing, developing land and incurred substantial expenditure, whether purchaser was guilty of any fraud or suppression of material facts before the authorities and when two views are possible, the authorities should not interfere.

15. Applying the above referred two judgments of this court as well as the judgment of the Supreme Court to the facts of the present case, at the cost of repetition it must be stated that so far as the petitioner's case is concerned, the Assistant Collector, Dholka has initiated proceeding under the Act for the first time in the year 1978, that is, after lapse of 7 years since the petitioner has purchased the land in the year 1971. There is also no manner of doubt that the petitioner has incurred huge expenditure for improving the land since both the S. Nos. 783/1 and 785 are adjoining to the land which he has purchased.

16. It is true that no period of limitation is laid down by the said Act indicating as to within what period the concerned authorities can initiate proceedings under Section 9 of the Act. It is also true that power given to the authorities is coupled with duty to act as per the provisions of Section 9 of the Act if power under Section 9 can be validly invoked. But that does not mean that power can be exercised at any time, may be after years or decades. Exercise of power has to be justified on the

facts of each case and if on the facts of a given case, it is found that exercise of power after lapse of sufficiently long period between the impugned transaction and the date of exercise of that power would be arbitrary and unreasonable due to the fact that in the meanwhile parties had changed their position irretrievably oblivious of any possibility of future action by the authorities functioning under the Act on account of prolonged inaction on the part of the authorities and any attempt to put back the clock would result in irreparable injury to the concerned parties, then such exercise has to be treated to be unjust and illegal. In that view of the matter, as seen above, on the facts of the case, the exercise of the power under section 9 against the petitioner would be unreasonable and arbitrary.

17. The Deputy Secretary, Revenue Department (Appeals), without considering the aspect of delay and without considering the fact that the said transaction of 10 gunthas was in consonance with the object of the Act and was not detrimental to the provisions of the Act, passed order to evict the petitioner which is liable to be set aside.

18. Seen in the above context, both the orders dated December 22, 1978 and May 28, 1990 recorded by the Assistant Collector, Dholka and Deputy Secretary, Revenue Department (Appeals) respectively are not in the spirit of the Act and, therefore, are liable to be set aside and quashed.

19. In the result, the petition succeeds and accordingly is allowed. The orders dated December 22, 1978 and May 28, 1990 recorded by the Assistant Collector, Dholka and Deputy Secretary, Revenue Department (Appeals) respectively, are hereby quashed and set aside. Rule is made absolute with no orders as to costs.

10.11.2000. (A.M. Kapadia, J.)

(karan)